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SEVENTH CIRCUIT

IN THE
Supreme Court of the United States

OCTOBER TERM, 1954

No.

GEORGE W. DOUD, DONALD Q. McDONALD, and J.
WESLEY CARLSON, doing business as BONDED
SYSTEMS, and EUGENE DERRICK,

Appellants,

vs.

ORVILLE HODGE, Auditor of Public Accounts of the
State of Illinois, LATHAM CASTLE, Attorney General of
the State of Illinois, and JOHN GUTKNECHT, State's
Attorney of Cook County, Illinois,

Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

STATEMENT AS TO JURISDICTION.

JOHN J. YOWELL
111 W. Washington Street,
Chicago 2, Illinois
Attorneys for Appellants.

Dated, June 3, 1955.

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STATEMENT AS TO JURISDICTION.

(a) THE OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, upon dismissing the suit after trial and the dissenting opinion were reported in 127 Federal Supplement 853, and are appended.

(b) THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(i) NATURE OF THE PROCEEDING

This is a suit by three citizens of Illinois, constituting a partnership, and their agent, another citizen of Illinois, seeking an injunction restraining the Auditor of Public Accounts, the Attorney General of the State of Illinois, and the State's Attorney of Cook County from enforcing against plaintiffs the provisions of the Illinois Community Currency Exchanges Act upon the ground that it is unconstitutional in that it denies to plaintiffs the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. It was filed pursuant to Title 28 U.S.C.A. 1331 (the matter exceeding in value the jurisdictional amount) arising under the first section of the Fourteenth Amendment to the Constitution of the United States, the amended complaint challenging as a denial of the equal protection of the law the statute and threatened State action. Pursuant to Title 28 U.S.C.A. 2281 and 2284, after answers were filed and trial on the merits, a judgment was rendered by a District Court of three judges, denying an injunction and dismissing the suit for want of jurisdiction.

(ii) DATE OF JUDGMENT AND OF NOTICE OF APPEAL.

The final judgment, which is here sought to be reviewed, was entered on February 9, 1955, and the notice of appeal was filed on April 8, 1955, in the United States District Court for the Northern District of Illinois, Eastern Division.

(iii) **THE STATUTORY PROVISIONS BELIEVED TO
CONFER JURISDICTION OF THE APPEAL.**

It is believed that this Court has jurisdiction of this appeal under U.S.C.A. Title 28, Sections 1253 and 2101(b).

(iv) **CASES BELIEVED TO SUSTAIN THE JURIS-
DICTION.**

The following cases are believed to sustain jurisdiction of this appeal: *Hines v. Davidowitz*, 312 U.S. 52; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55; *Valentine v. Great Atlantic & Pacific Tea Co.*, 299 U.S. 32; *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550; *Sterling v. Constantin, et al.*, 287 U.S. 378; *Railroad Commission of California v. Los Angeles Ry. Corp.*, 280 U.S. 145; *Fidelity & Deposit Co. of Maryland v. Tafoya*, 270 U.S. 426; *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570; *Pacific Tel. & Tel. Co. v. Kyte*, 265 U.S. 196; *Hart v. B. F. Keith Vaudiville Exchange*, 262 U.S. 271; *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290; and *South Covington, etc. Ry. Co. v. Newport*, 259 U.S. 97.

(v) **THE STATUTE INVOLVED.**

This case involves the validity of the Illinois statute entitled "An Act in Relation to the Definition, Licensing and Regulation of Community Currency Exchanges and Ambulatory Currency Exchanges, and the Operators and Employees Thereof, and to Make an Appropriation Therefor and to Provide Penalties and Remedies for the Violation Thereof, approved June 30, 1943, Illinois Laws of 1943, Volume 1, page 223; title as amended by Act approved June 27, 1951, Laws, 1951, page 562; Chapter 161 1/2, Revised Statutes of Illinois 1953, Sections 30 to 56.3, both inclusive. The statutory provisions involved are lengthy and the text of the statute is set forth in the appendix.

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(c) QUESTIONS PRESENTED BY THE APPEAL

The following questions are presented, as stated in the notice of appeal:

1. Whether the Illinois Community Currency Exchanges Act denies to plaintiffs the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in view of the identical similarity of the business conducted by American Express Company in Illinois and that in which plaintiffs are engaged and intend to engage in Illinois, in that

(a) Said statute imposes licens fees and conditions upon the sale of Bondified Systems money orders in separate business establishments and exempts such sales of American Express Company money orders from all such requirements;

(b) Said statute absolutely prohibits the plaintiffs from engaging in a lawful business, namely, the sale of money orders in retail stores, while permitting American Express Company to engage in the same activity;

(c) Said statute permits operators of retail stores, including the plaintiff Derrick, to sell American Express Company money orders, but prohibits them from selling Bondified Systems money orders.

2. Whether the jurisdiction of the Federal Court is dependent upon a prior determination of the constitutionality of the statute as to plaintiffs by the State Supreme Court, the statute being clear and unambiguous and its application to plaintiffs being unquestioned.

(d) **THE FACTS MATERIAL TO CONSIDERATION
OF THE QUESTIONS PRESENTED:**

The amended complaint alleged and the court found that the plaintiffs Bond, McDonald and Carlson, constituting a partnership doing business under the firm name of Bondified Systems, reside in the City of Wheaton, DuPage County, Illinois, have their office and principal place of business in Chicago, Illinois, and engage exclusively in the business of selling and issuing money orders up to \$100.00 in amount under the firm name "Bondified Systems" through agents engaged in operating retail stores; that the plaintiff Derrick, as the agent of the partnership, is engaged in the sale and issuance of "Bondified" money orders in his drug store at Wheaton, Illinois; that American Express Company, an aggregation of individuals, not a corporation, sells and issues money orders in Illinois through operators of drug and grocery stores; that it does not operate under any franchise granted by the State of Illinois and is not subject to regulation by any regulatory body thereof, and that it is engaging in the same activity in which plaintiffs have been engaged and desire to engage, namely, the business of selling money orders through agents operating retail stores.

The challenged Act defines a community currency exchange as a person, firm or corporation engaged (a) in the business of cashing checks, drafts and money orders, or (b) in the business of selling or issuing money orders, or (c) in both such businesses; it contains two classes of exemptions, first, banks, second, persons, firms and corporations selling or issuing United States Post Office money orders, Postal Telegraph Company money orders, Western Union Telegraph Company money orders, or American Express Company money orders; it prohibits all

persons, firms or corporations except those exempted from engaging in the business of selling or issuing money orders, without first securing a license to do so from the State Auditor of Public Accounts, the payment of prescribed fees and submitting to the requirements of the Act, and it absolutely prohibits all persons, firms or corporations except those exempted from selling money orders as a department of another business, or in any room in which any other business, trade or profession is conducted.

The amended complaint alleges that the classification made by said Act is unconstitutional and void and in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that (1) American Express Company operates its money order business in substantially the same manner in which plaintiffs operate, and there is no substantial basis for exempting from the operation of the Act persons, firms or corporations which sell American Express Company money orders and not persons, firms and corporations selling and issuing the plaintiffs' money orders; (2) that the exemption of American Express Company money orders is wholly unwarranted, not germane to the purpose of the statute and highly discriminatory; that American Express Company agents in issuing money orders are in direct competition with the plaintiffs, residents and citizens of the State of Illinois, who are forbidden to operate in the same manner as American Express Company.

It is further alleged that the defendants, the Auditor of Public Accounts and the Attorney General of the State, have threatened the plaintiffs with action in the courts of the State of Illinois to prevent continuance of their business and to enforce the provisions of said Act by criminal prosecution.

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The defendants filed answers and the case was tried on the merits before the three judge court which found facts substantially as above set forth and then concluded that it could not decide the constitutional question presented for lack of jurisdiction "in the absence of an authoritative determination by the Illinois Supreme Court that the exemption of American Express Company is constitutional as applied to persons in the position of these plaintiffs", notwithstanding that the Supreme Court of the State had held in *McDougall v. Lueder*, 389 Ill. 141, that the statute is valid, that the exemption is valid, and that the General Assembly would not have passed the Act without the exemption, and notwithstanding the decision of another three judge court in *Currency Services, Inc. v. Matthews*, 90 Fed Suppl. 40. In the dissenting opinion it was said that "the plaintiffs, supported by the decision of another three judge court * * * have raised a substantial federal constitutional question. The application of the challenged statute to the plaintiffs is unquestioned and the Supreme Court of Illinois has already upheld the exemption of American Express Company without suggesting that its decision in any way rested on the nature of the activities of the plaintiffs in the decided case."

**(c) REASONS WHY THE QUESTIONS PRESENTED
ARE SO SUBSTANTIAL AS TO REQUIRE PLEN-
ARY CONSIDERATION.**

This appeal appropriately draws in question the validity under the Federal Constitution of a state statute and actions threatened by state officers upon their construction and insistence that the statute is valid and applicable to the plaintiffs, and the questions presented are so substantial as to require plenary consideration.

A determination is sought whether the District Court was correct (a) in denying plaintiffs' application for a permanent injunction after a trial on the merits and after every material allegation of the amended complaint was either admitted or found as a fact by the court, in view of this Court's decisions in *Torao Takahashi v. Fish & Game Commission*, 334 U.S. 410; *Pierre v. State of Louisiana*, 306 U.S. 354; *Hartford, etc. v. Harrison*, 301 U.S. 459; *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550; *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32; *Hopkins v. Southern California Telephone Co.*, 275 U.S. 393; *Schlesinger v. Wisconsin*, 270 U.S. 230; *Air-Way Appliance Corp. v. Day*, 266 U.S. 71; *Truax v. Corrigan*, 257 U.S. 312; *Royster Guano Co. v. Virginia*, 253 U.S. 412; *Southern Railway Co. v. Greene*, 216 U.S. 400; *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540; and (b) in holding that the federal courts have no jurisdiction to determine the constitutionality of the Act, or to give relief, unless and until the Supreme Court of Illinois has again passed upon the Act and held it constitutional as applied to plaintiffs, in view of this Court's decisions in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55; *Sterling v. Constantin, et al.*, 287 U.S. 378; *Fidelity & Deposit Co. of Maryland v. Tafoya*, 270 U.S. 426; *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570; *Pacific Tel. & Tel. Co. v. Kaykendall*, 265 U.S. 196; *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 230; *Hart v. B. F. Keith Vanderhille Exchange*, 262 U.S. 271; *So. Carington Ry. Co. v. Newport*, 259 U.S. 97.

The decision is in sharp conflict with *Currency Services, Inc., et al. v. Matthews, et al.*, 90 Fed. Suppl. 40, holding unconstitutional under similar circumstances the Wisconsin statute which was copied from the Illinois statute in question. A substantial constitutional question of far-reaching

importance is presented in whether the federal courts are powerless to prevent continuing loss while from day to day and month to month citizens of a state are being deprived of the right to conduct a lawful business when their competitors, citizens of other states, are given a virtual monopoly, when the Supreme Court of the state has held that the statute is valid, that the exemption is valid and that the General Assembly would not have passed the Act without the exemption.

Respectfully submitted,

JOHN J. YOWELL,
111 W. Washington Street,
Chicago 2, Illinois,
Attorney for Appellants.

APPENDIX.

COPY OF STATUTE HERE INVOLVED.

Illinois Revised Statutes 1953, Chapter 16 $\frac{1}{2}$, Sections 30. to 56.3, inclusive.

COMMUNITY CURRENCY EXCHANGES

AN ACT in relation to the definition, licensing and regulation of community currency exchanges and ambulatory currency exchanges, and the operators and employees thereof, and to make an appropriation therefor, and to provide penalties and remedies for the violation thereof. Approved June 30, 1943. L.1943, vol. 1, p. 233. Title as amended by act approved June 27, 1951. L.1951, p. 562.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

§ 30. *Findings and declaration of General Assembly.*
§ 30.1. The General Assembly has found and declares:

That the community currency exchange business, as hereinafter defined in Section 1 has become so widespread since the bank holiday in 1933, and so extensively and intimately integrated with the financial institutions of this State that it is affected with a public interest and should be licensed and regulated as a business affecting the convenience, general welfare, and economic interest of the people of this State;

that no community currency exchange should be operated without a license, or otherwise than in accordance with the regulations provided in, or to be provided pursuant to this Act;

that the number of community currency exchanges should be limited in accordance with the needs of the communities they are to serve, and in accordance with the provisions of this Act;

that there has arisen also the ambulatory currency exchange business, as hereinafter defined in Section 1, which has engaged heretofore in unlicensed competition with the licensed community currency exchange business;

that it is in the public interest to promote and foster the community currency exchange business and to assure the financial stability thereof;

that the operations of the ambulatory currency exchange business have enabled it to appropriate the most profitable function of the community currency exchange business without incurring the expenses of, or subjecting itself to the regulations imposed upon the community currency exchange business, and to secure thereby an unfair advantage; that there has resulted therefrom an unfair and ruinous competition to the licensed community currency exchange business;

that the nature of the ambulatory currency exchange business is such as to render it hazardous and dangerous to the public safety and security;

that the public welfare demands that no ambulatory currency exchange business should be operated without a license, or otherwise than in accordance with the regulations provided in, or to be provided pursuant to this Act. Added by act approved June 27, 1951, L.1951, p. 562.

31. Definitions—Businesses to which Act applicable.]

§ 1. For the purposes of this Act:

“Community currency exchange” means any person, firm, association, partnership or corporation, except banks incorporated under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing

money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, American Express Company money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services.

"Ambulatory Currency Exchange" means any person, firm, association, partnership or corporation, except banks organized under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged in one or both of the foregoing businesses, or engaged in performing any one or more of the foregoing services, at any location other than that of a fixed and permanent place of business of his, their or its own.

"Auditor" means the Auditor of Public Accounts.

Nothing in this Act shall be held to apply to any person, firm, association, partnership, or corporation who is engaged primarily in the business of transporting for hire, bullion, currency, securities, negotiable or non-negotiable documents, jewels or other property of great monetary value and who in the course of such business and only as an incident thereto, cashes checks, drafts, money orders or other evidences of money directly for, or for the employees of and with the funds of and at a cost only to, the person, firm, association, partnership or corporation for whom he or it is then actually transporting such bullion, currency, securities, negotiable or non-negotiable documents, jewels, or other property of great monetary value, pursuant to a written contract for such transportation and all incidents thereof, nor shall it apply to any person, firm, association, partnership or corporation engaged in the business of selling tangible personal property at retail who, in the course of such business and only as an incident thereto, cashes checks, drafts, money orders or other evidences of money. As amended by act approved June 27, 1951. 1.4951, p. 562.

32. *License to operate community currency exchange — Penalty for operation without license—Injunction.* § 2. No person, firm, association, partnership or corporation shall engage in the business of a community currency exchange or in the business of an ambulatory currency exchange without first securing a license to do so from the Auditor.

Any person, firm, association, partnership or corporation issued a license to do so by the Auditor shall have authority to operate a community currency exchange or an ambulatory currency exchange, as defined in Section 1 hereof.

No license shall be issued for the conduct of an ambulatory currency exchange on any public street or highway. An ambulatory currency exchange shall be required to and shall secure a license or licenses for the conduct of its business at each and every location served by it, as provided in Section 4 hereof. No license issued for the conduct of its business at one location shall authorize the conduct of its business at any other location.

Any person, firm, association, partnership or corporation that violates this section shall be fined not less than \$500.00 nor more than \$1000.00 or imprisoned in the county jail for not more than one year, or both, and the Attorney General or the State's Attorney of the county in which the violation occurs shall file a complaint in the Circuit Court of the county to restrain the violation. As amended by act approved June 27, 1951. L.1951, p. 562.

33. *Powers of community currency exchanges.* § 3. No community or ambulatory currency exchange shall be permitted to accept money or evidences of money as a deposit to be returned to the depositor or upon the depositor's order; and no community or ambulatory currency exchange shall be permitted to act as bailee or agent for persons, firms, partnerships, associations or corporations to hold money or evidences thereof or the proceeds therefrom for the use and benefit of the owners thereof, and deliver such money or pro-

ceeds of evidence of money upon request and direction of such owner or owners; provided, that nothing contained herein shall prevent a community or an ambulatory currency exchange from obtaining state automobile and city vehicle license, for a fee or service charge, or from rendering a photostat service, or from rendering a notary service either by the proprietor of the currency exchange or any one of its employees, authorized by the State of Illinois to act as a notary public, or from selling travelers cheques obtained by the currency exchange from a banking institution under a trust receipt, or from issuing money orders or from accepting for payment local utility bills; provided, further, that in accepting any such payment the community or ambulatory currency exchange shall not be deemed to act as agent for the local utility, nor shall such community or ambulatory currency exchange be authorized to receipt for such payment in the name, or on behalf, of such utility. As amended by act approved June 27, 1951. L.1951, p. 562.

33.1 *Income tax service.*] § 3.1. Nothing in this Act shall prevent a currency exchange from rendering State or Federal income tax service; nor shall the rendering of such service be considered a violation of this Act if such service be rendered either by the proprietor or any of his employees. Added by act approved Aug. 3, 1949. L.1949, p. 336.

34. *Application for license—Contents—Fees.*] § 4. Application for such license shall be in writing under oath and in the form prescribed and furnished by the Auditor. Each application shall contain the following:

(a) The full name and address (both of residence and place of business) of the applicant, and if the applicant is a partnership or association, of every member thereof, and the name and business address if the applicant is a corporation;

(b) The county and municipality, with street and number, if any, where the community currency exchange is to be conducted, if the application is for a community currency exchange license;

(c) If the application is for an ambulatory currency exchange license, the names and addresses of the plants or businesses at the location or locations to be served by it; and

(d) The applicant's occupation or profession; a detailed statement of his business experience for the ten years immediately preceding his application; a detailed statement of his finances; his present or previous connection with any other currency exchange; whether he has ever been involved in any civil or criminal litigation, and the material facts pertaining thereto; whether he has ever been committed to any penal institution or admitted to an institution for the care and treatment of mentally ill persons; and the nature of applicant's occupancy of the premises to be licensed where the application is for a community currency exchange license. If the applicant is a partnership, the information specified herein shall be required of each partner. If the applicant is a corporation the said information shall be required of each officer and director thereof.

Such application shall be accompanied by a fee of \$25.00 which fee shall be for the cost of investigating the applicant. When the application for a community exchange license has been approved by the Auditor and the applicant so advised, an additional sum of \$50.00 as an annual license fee for a period terminating on the last day of the current calendar year shall be paid to the Auditor by the applicant; provided, that the license fee for an applicant applying for such a license after July 1st of any year shall be \$25.00 for the balance of such year.

When the application for an ambulatory currency exchange license has been approved by the Auditor and such applicant so advised, such applicant shall pay an annual license fee of \$10.00 for each and every location to be served by such applicant; provided that such license fee for an approved applicant applying for such a license after July 1st of any year shall be \$5.00 for the balance of such year for each and every location to be served by

such applicants. An approved applicant shall not be required to pay the initial investigation fee of \$25.00 more than once. Such an approved applicant, when applying for a license with respect to a particular location, shall file with the Auditor, at the time of filing an application, a letter or memorandum, which shall be in writing and under oath, signed by the owner or authorized representative of the place of business where service is to be rendered; such letter or memorandum shall contain a statement that such service is desired, and that the person signing the same is authorized so to do. As amended by act approved June 27, 1951, L.1951, p. 562.

31.1. Investigation to determine advisability of granting application—“Community” defined.] § 4.1. Upon receipt of an application for a license for a community currency exchange, the Auditor shall investigate the need of the community for the establishment of a community currency exchange at the location specified in the application.

“Community”, as used in this Act means a locality where there may or can be available to the people thereof the services of a community currency exchange reasonably accessible to them. If the issuance of a license to engage in the community currency exchange business at the location specified, will not promote the convenience and advantage of the community in which the business of the applicant is proposed to be conducted, then the application shall be denied. As amended by act approved June 26, 1951, L.1951, p. 551.

31.2. Ownership held in estate—Continuing operation by Executor etc. License.] § 4.2. Whenever the ownership of any Currency Exchange, theretofore licensed under the provisions of this Act, shall be held or contained in any estate subject to the control and supervision of any Administrator, Executor, Guardian or Conservator appointed, approved or qualified by any Court of the State of Illinois, having jurisdiction so to do, such Administrator, Executor, Guardian, or Conservator, may, upon the entry of an order by such Court granting leave

to continue the operation of such Currency Exchange, apply to the Auditor of Public Accounts for a license under the provisions of this Act. When any such Administrator, Executor, Guardian or Conservator shall apply for a Currency Exchange License pursuant to the provisions of this Section, and shall otherwise fully comply with all of the provisions of this Act relating to the application for a Currency Exchange license, the Auditor may issue to such applicant a Currency Exchange license. Any Currency Exchange license theretofore issued to a Currency Exchange, for which an application for a license shall be sought under the provisions of this Section, if not previously surrendered, lapsed, or revoked, shall be surrendered, revoked or otherwise terminated before a license shall be issued pursuant to application made therefor under this Section. Added by act approved Aug. 3, 1949. L.1949, p. 336.

35. *Bond — Conditions — Amount.* § 5. Before any license shall be issued to a community currency exchange the applicant shall file annually with and have approved by the Auditor a surety bond, issued by a bonding company or insurance company authorized to do business in this State in the principal sum of \$3,000.00. Such bond shall run to the Auditor and shall be for the benefit of any creditors of such currency exchange for any liability incurred by the currency exchange on any money orders issued or sold by the currency exchange and for any liability incurred by the currency exchange for any sum or sums due to any payee or endorsee of any check, draft or money order left with the currency exchange for collection, and for any liability incurred by the currency exchange in connection with the rendering of any of the services referred to in Section 3 of this Act.

If after the expiration of one year from the issuance of the license the Auditor shall determine that the average amount of such liability during said year has exceeded the sum of \$4,000.00 and has been less than \$5,000.00, the Auditor shall require the licensee to furnish a bond for the ensuing year to be approved by the

Auditor in the principal sum of \$4,000.00. If such average amount is in excess of \$5,000.00 the bond shall be for an additional principal sum of \$1,000.00 for each \$1,000.00 or fraction thereof in excess of the original \$5,000.00; however, the maximum amount of such bond shall not exceed the principal sum of \$25,000.00. As amended by act approved June 26, 1951. L.1951, p. 551.

36. *Insurance against burglary, etc.—Amount.*] § 6. Every applicant for a license hereunder shall, after his application for a license has been approved, file with and have approved by the Auditor, a policy or policies of insurance issued by an insurance company or indemnity company authorized to do business under the laws of this State, which shall insure the applicant against loss by burglary, larceny, robbery, forgery or embezzlement in a principal sum as hereinafter provided; if the average amount of cash and liquid funds to be kept on hand in the office of the community currency exchange during the year will not be in excess of \$2,500 the policy or policies shall be in the principal sum of \$2,500. If such average amount will be in excess of \$2,500, the policy or policies shall be for an additional principal sum of \$500 for each \$1,000 or fraction thereof of such excess over the original \$2,500, provided that the maximum amount of such insurance shall in no event exceed the principal sum of \$35,000.00. From time to time the Auditor may determine the amount of cash and liquid funds on hand in the office of any community currency exchange and shall require the licensee to submit additional policies if the same are determined to be necessary in accordance with the requirements of this section.

Any such policy or policies, with respect to forgery, may carry a condition that the community currency exchange assumes the first \$50 of each claim thereunder. As amended by act approved July 10, 1953. L.1953, p., H.B.No.811.

37. *Minimum funds to be kept available—Receiver.*] § 7. Each community currency exchange shall have, at all times, a minimum sum of \$3,000 of its own cash funds

available for the uses and purposes of its business, and said minimum sum shall be exclusive of and in addition to funds received for exchange or transfer; and in addition thereto each such licensee shall at all times have on hand an amount of liquid funds sufficient to pay on demand all outstanding money orders issued by it.

In the event a receiver is appointed in accordance with Section 15.1 of this Act and the Auditor determines that the business of the currency exchange should be liquidated, and if it shall appear that the said minimum sum was not on hand or available at the time of the appointment of the receiver, then the receiver shall have the right to recover in any court of competent jurisdiction from the owner or owners of such currency exchange or from the stockholders and directors thereof if such currency exchange was operated by a corporation, said sum or that part thereof which was not on hand or available at the time of the appointment of such receiver. Nothing contained in this section shall limit or impair the liability of any bonding or insurance company on any bond or insurance policy relating to such community currency exchange issued pursuant to the requirements of this Act, nor shall anything contained herein limit or impair such other rights or remedies as the receiver may otherwise have at law or in equity. As amended by act approved June 26, 1951. L. 1951, p. 551.

38. *Exchange to be conducted as separate unit.*] § 8. A community or an ambulatory currency exchange shall not be conducted as a department of another business. It must be an entity, financed and conducted as a separate business unit. This shall not prevent a community or an ambulatory currency exchange from leasing a part of the premises of another business for the conduct of this business on the same premises; provided, that no community currency exchange shall be conducted on the same premises with a business whose chief source of revenue is derived from the sale of alcoholic liquor for consumption on the premises; provided, further, that no community currency exchange hereafter licensed for the first time

shall share any room with any other business, trade or profession nor shall it occupy any room from which there is direct access to a room occupied by any other business, trade or profession. As amended by act approved June 27, 1951. L.1951, p. 562.

39. *No tokens to be issued.* § 9. No community or ambulatory currency exchange shall issue tokens to be used in lieu of money for the purchase of goods or services from any enterprise. As amended by act approved June 27, 1951. L.1951, p. 562.

40. *Qualifications of applicant—Approval—Term of license—Hearing—Denial of license—Review.* § 10. The applicant, and its officers and directors, if a corporation, shall be vouched for by two reputable citizens of this State setting forth that the individual mentioned is (a) personally known to them to be trustworthy and reputable, (b) that he has business experience qualifying him to competently conduct, operate, own or become associated with a currency exchange, (c) that he has a good business reputation and is worthy of a license. Thereafter, the Auditor shall, upon approval of the application filed with him, issue to the applicant qualifying under this Act a license to operate a currency exchange. If it is a license for a community currency exchange, the same shall be valid only at the place of business specified in the application. If it is a license for an ambulatory currency exchange, it shall entitle the applicant to operate only at the location or locations specified in the application, provided the applicant shall secure separate and additional licenses for each of such locations. Such licenses shall remain in full force and effect until they are surrendered by the licensee, or revoked, or expire, as herein provided. If the Auditor shall not so approve, he shall not issue such license or licenses and shall notify the applicant of such denial, retaining the \$25.00 investigation fee to cover the cost of investigating the applicant. The Auditor shall approve or deny every application hereunder within ninety days from the filing thereof; except that in respect to application for an approved ambulatory currency ex-

change for a license with regard to a particular location to be served by it, the same shall be approved or denied within twenty days from the filing thereof.

No application shall be denied unless the applicant has had notice of a hearing on said application and an opportunity to be heard thereon. If the application is denied, the Auditor shall, within twenty days thereafter prepare and keep on file in his office a written order of denial thereof, which shall contain his findings with respect thereto and the reasons supporting the denial, and shall send by United States mail a copy thereof to the applicant at the address set forth in the application, within five days after the filing of such order. A review of any such decision may be had as provided in Section 22.01 of this Act. As amended by act approved June 27, 1951. L.1951, p. 562.

40.1 Subpoenas — Documentary evidence — Hearing — Court order to obey subpoena.] § 10.1; For the purposes of this Act, the Auditor, and the hearing officer, as hereinafter provided, shall have power to require by subpoena the attendance and testimony of witnesses, and the production of all documentary evidence relating to any matter under hearing pursuant to this Act, and shall issue such subpoenas at the request of any interested party. The hearing officer may sign subpoenas in the name of the Auditor.

The Auditor may, in his discretion, direct that any hearing pursuant to this Act, shall be held before a competent and qualified agent of the Auditor, whom the Auditor shall designate as the hearing officer in such matter. The Auditor, and the hearing officer, are hereby empowered to, and shall, administer oaths and affirmations to all witnesses appearing before them. The hearing officer, upon the conclusion of the hearing before him, shall certify the evidence to the Auditor.

Any Circuit Court of this State, within the jurisdiction of which such hearing is carried on, may, in case of contumacy, or refusal of a witness to obey a subpoena, issue

an order requiring such witness to appear before the Auditor, or the hearing officer, or to produce documentary evidence, or to give testimony touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Added by act approved June 26, 1951. L.1951, p. 551.

41. *Form of license—Posting.*] § 11. Such license, if issued for a community currency exchange, shall state the name of the licensee and the address at which the business is to be conducted. Such license shall be kept conspicuously posted in the place of business of the licensee and shall not be transferable or assignable. If issued for an ambulatory currency exchange, it shall so state, and shall state the name and office address of the licensee, and the name and address of the location or locations to be served by the licensee, and shall not be transferable and assignable. As amended by act approved June 27, 1951. L.1951, p. 562.

42. *Additional bond.*] § 12. If the Auditor shall find at any time that the bond is insecure or exhausted or otherwise doubtful, an additional bond in like amount to be approved by the Auditor shall be filed by the licensee within thirty (30) days after written demand therefor upon the licensee by the Auditor.

43. *Number of licenses—Change of location.*] § 13. No more than one place of business shall be maintained under the same license, but the Auditor may issue more than one license to the same licensee upon compliance with the provisions of this Act governing an original issuance of a license, for each new license.

Whenever a licensee shall wish to change the name or place of business as originally set forth in his license, he shall give written notice thereof to the Auditor and if the change is approved by the Auditor he shall attach to the license, in writing, a rider stating the new name or the new address or location of the community currency exchange.

Every application for a change of location of a community currency exchange shall be treated by the Auditor

with respect to the approval or disapproval of the proposed location, in the same manner as is otherwise provided in this Act for the treatment of proposed locations as contained in original applications for community currency exchange licenses; and if any fact or condition then exists with respect to the application for change of location, which fact or condition would otherwise authorize denial of an original application for a community currency exchange license because of the proposed location, then such application for change of location shall not be approved. As amended by act approved June 26, 1951. L.1951, p. 551.

§43.1 *Consolidation of places of business.*] §13.1 Whenever two or more licensees shall desire to consolidate their places of business, they shall make application for such consolidation to the Auditor upon a form provided by him. This application shall state: (a) the name to be adopted and the location at which the business shall be located, which name and location shall be the same as one of the consolidating licensees; (b) that the owners, or all partners, or all stockholders, as the case may be, of the licensees involved in the contemplated consolidation, have approved the application; (c) a certification by the secretary, if any of the licensees be corporations, that the contemplated consolidation has been approved by all of the stockholders at a properly convened stockholders meeting; (d) other relevant information the Auditor may require. Simultaneously with the approval of the application by the Auditor, the licensee or licensees who will cease doing business shall: (a) surrender their license or licenses to the Auditor; (b) transfer all of their assets and liabilities to the licensee continuing to operate by virtue of the application; (c) apply to the Secretary of State, if they be corporations, for surrender of their corporate charter in accordance with the provisions of "The Business Corporation Act", filed July 13, 1933, as amended.

An application for consolidation shall be approved or rejected by the Auditor within 30 days after receipt by

raised by plaintiffs because that question has never been presented to the Illinois Supreme Court, and hence the federal courts are without jurisdiction to determine it in the first instance, citing *Spector Motor Co. v. McLaughlin*, 323 U. S. 101, at 104, and *Federation of Labor v. McAdory*, 325 U. S. 450, at 471.

The amended complaint alleges that the partnership is organized for the purpose of, intends to engage, and has been engaging, not in the ordinary business of a currency exchange, but exclusively in the business of selling and issuing money orders under the firm name "Bondified Systems" in the Counties of DuPage and Cook and other portions of the State of Illinois. That business is to be conducted through agents, who are principally persons engaged in operating retail drug, hardware and grocery stores.

It is also alleged by plaintiffs, and proved by the evidence, that on August 11, 1953, they appointed the plaintiff Derrick (who conducts a drug store) as their agent for the sale to the public of postcard checks and money orders issued by the partnership firm.

Section 1 of the Act provides in part:

"§ 1. For the purposes of this Act: 'Community currency exchange' means any person, firm, association, partnership or corporation, except banks incorporated under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged at a fixed and permanent place of business, in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or

him of such application and supporting documents required thereunder.

Such consolidation shall not affect suits pending in which the surrendering licensees are parties; nor shall such consolidation affect causes of action nor the rights of persons in particular, nor shall suits brought against such licensees in their former names be abated for that cause.

Nothing contained herein shall limit or prohibit any action or remedy available to a licensee or to the Auditor under Sections 15, 15.1 or 15.2 of this Act. Added by act approved July 10, 1953. L.1953, p. —, H.B.No.811.

44. *Annual license fee.*] § 14. Every licensee, shall, on or before November 15, pay to the Auditor the annual license fee or fees for the next succeeding calendar year and shall at the same time file with the Auditor the annual report required by Section 16 of this Act, and the annual bond or bonds, and the insurance policy or policies as and if required by this Act. The annual license fee for each community currency exchange shall be \$50.00. The annual license fee for each location served by an ambulatory currency exchange shall be \$10.00. As amended by act approved June 27, 1951. L.1951, p. 562.

45. *Revocation of license—Surrender—New license—Hearing—Notice of revocation—Review.*] § 15. The Auditor may, upon ten days notice to the licensee by United States mail directed to the licensee at the address set forth in the license, stating the contemplated action and in general the grounds therefor, and upon reasonable opportunity to be heard prior to such action, revoke any license issued hereunder if he shall find that:

(a) The licensee has failed to pay the annual license fee or to maintain in effect the required bond or bonds or insurance policy or policies or to comply with any order, decision, or finding of the Auditor made pursuant to this Act, or that

its name, or any other money orders (other than United States Post Office money orders, American Express Company money order, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such business, or engaged in performing any one or more of the foregoing services."

Section 8. of said Act provides in part:

"§ 8. A community * * * currency exchange shall not be conducted as a department of another business. It must be an entity, financed and conducted as a separate business unit * * *"

Plaintiffs contend that the exemption of those engaged in the business of selling or issuing American Express Company money orders is "wholly unwarranted" and is "highly discriminatory."

Plaintiffs also contend that "the arbitrary, discriminatory character of" the Act "as applied to plaintiffs * * * engaged exclusively in the business of selling and issuing money orders is farther illustrated by the exemption from said statute of sale of American Express Company money orders by persons, firms, and corporations whose principal business consists in the operation of retail drug, hardware and grocery stores." This contention means briefly that plaintiffs' agent cannot sell and issue money orders as an adjunct to his drug store business while an agent of American Express, its direct competitor, can do just that.

The admissions in the pleadings establish that American Express Company is an aggregation of individuals operating under a joint company plan. It is not a corporation. It sells and issues money orders in the City of Chicago, Illinois, through operators of drug and grocery stores.

(b) The licensee has violated any provision of this Act or any regulation or direction by the Auditor under this Act; or that

(c) Any fact or condition exists which, if it had existed at the time of the original application for such license, would have warranted the Auditor in refusing the issuance of the license; or that

(d) The licensee has not operated the currency exchange licensed, for a period of sixty consecutive days, unless the licensee was prevented from operating during such period by reason of events or acts beyond the licensee's control.

The Auditor may revoke only the particular license or licenses for particular places of business or locations with respect to which grounds for revocation may occur or exist, or if he shall find that such grounds for revocation are of general application to all places of business or locations, or to more than one place of business or location operated by such licensee, he may revoke all of the licenses issued to such licensee or such number of licenses to which such grounds apply, as the case may be.

A licensee may surrender any license by delivering to the Auditor written notice that he, they or it thereby surrenders such license, but such surrender shall not affect such licensee's civil or criminal liability for acts committed prior to such surrender, or affect the liability on his, their or its bond or bonds, or his, their or its policy or policies of insurance, required by this Act, or entitle such licensee to a return of any part of the annual license fee or fees.

Every license issued hereunder shall remain in force until the same shall expire, or shall have been surrendered or revoked in accordance with this Act, but the Auditor may on his own motion, issue new licenses to a licensee whose license or licenses shall have been revoked if no fact or condition then exists which clearly would have warranted the Auditor in refusing originally the issuance of such license under this Act.

No license shall be revoked until the licensee has had notice of a hearing thereon and an opportunity to be

heard. When any license is so revoked, the Auditor shall within twenty days thereafter, prepare and keep on file in his office, a written order or decision of revocation which shall contain his findings with respect thereto and the reasons supporting the revocation and shall send by United States mail a copy thereof to the licensee at the address set forth in the license within five days after the filing in his office of such order, finding or decision. A review of any such order, finding or decision may be had as provided in Section 22.01 of this Act. As amended by act approved July 13, 1953. L.1953, p. —, H.B.No.251.

45.1 Receivership—Notice to claimants—Injunction—Dividends—Pending actions.] § 15.1: If the Auditor determines that any licensee is insolvent or is violating this act, he shall appoint a receiver, who shall, under his direction, for the purpose of the receivership, take possession of and title to the books, records and assets of every description of ~~said~~ community currency exchange. The Auditor shall require of the receiver such security as he deems proper and, upon appointment of the receiver, shall have published, once each week for four consecutive weeks in a newspaper having a general circulation in the community, a notice calling on all persons who have claims against the community currency exchange, to present them to the receiver.

Within ten days after the receiver takes possession of the property, the licensee may apply to the Circuit Court of Sangamon County to enjoin further proceedings in the premises.

The receiver may operate the community currency exchange until the Auditor determines that possession should be restored to the licensee or that the business should be liquidated. If the Auditor determines that the business should be liquidated he shall direct the Attorney General to file a bill in the Circuit Court of the county in which such community currency exchange is located, in the name of the People of the State of Illinois, for the orderly liquidation and dissolution of the community

currency exchange and for an injunction restraining the licensee or the officers and directors thereof from continuing the operation of said community currency exchange.

The receiver shall, thirty days from the day the Auditor determines that the business should be liquidated, file with the Auditor and with the clerk of such court as may have charge of the liquidation, a correct list of all creditors who have not presented their claims. The list shall show the amount of the claim after allowing all just credits, deductions and set-offs as shown by the books of the currency exchange. These claims shall be deemed proven unless objections are filed by some interested party within the time fixed by the Auditor or court that has charge of the liquidation.

The Auditor may make a ratable dividend of the moneys collected by the receiver on all claims that have been proved to his satisfaction or adjudicated in a court of competent jurisdiction whenever moneys are available for distribution.

All unclaimed dividends shall be deposited with the Auditor to be paid out by him when proper claims therefor are presented to the Auditor, and the Auditor shall pay the same out of such sums or funds so deposited with him. After one year from the final dissolution of the currency exchange, the Auditor shall make a pro-rata distribution thereof to those claimants who have accepted dividends until such claim or claims are paid in full, and if any of said monies shall then remain in his hands, the Auditor shall distribute same pro rata to the owner, owners or stockholders of the currency exchange. The Auditor shall deduct, from the funds so deposited with him the expenses of distributing same.

Upon the order of a court of competent jurisdiction of the county wherein the community currency exchange is located, the receiver may sell or compound any bad or doubtful debt, and on like order may sell the personal property of the Community currency exchange on such terms as the court approves. The receiver shall succeed to

engage. As we have seen, American Express Company operates only that part of a general currency business which is limited to the issuing and selling of money orders. It does it, without a license issued under the Act, within the same limits plaintiffs wish to operate without being licensed. The Illinois Supreme Court might find that to deny plaintiffs that right would be to deprive them of the same protection which American Express Company enjoys under the law. It well may be that the Illinois Supreme Court would hold the exemption of American Express Company unconstitutional as applied to persons in the position of these plaintiffs and at the same time adhere to its holding that the exemption is constitutional as applied to persons in the position of the *McDougall* plaintiffs. See: *Roberts & Schaefer Co. v. Emmerson*, 271 U. S. 50, at 54 (affirming 313 Ill. 137). The federal courts, before passing on the question urged by the present plaintiffs, must wait until the Illinois Supreme Court has spoken in answer to that same question.

It is therefore necessary that the amended complaint be dismissed for want of jurisdiction. Counsel for defendants will present an order accordingly within five days.

whatever right or remedies the unsecured creditors of the currency exchange may have against the owner or owners, operators, stockholders, directors, or officers thereof, arising out of their claims against the currency exchange; provided, however, that nothing herein contained shall prevent such creditors from filing their claims in the liquidation proceeding. The receiver may enforce such rights or remedies in any court of competent jurisdiction.

At the close of the receivership, it shall be the duty of the receiver to turn over to the Auditor all books of account and ledgers of such currency exchange for preservation. All records of such receiverships heretofore and hereafter received by the said Auditor shall be held by him for a period of two years after the close of the receivership and at the termination of said two year period may then be destroyed.

All expenses of the receivership, including reasonable receiver's, solicitor's and attorney's fees, approved by the Auditor, shall be paid out of the assets of the community currency exchange; and all expenses of any preliminary or other examinations into the condition of the community currency exchange or receivership, and all expenses incident to the possession and control of any property or records of the community currency exchange incurred by the Auditor shall be paid out of the assets of the community currency exchange. The foregoing expenses shall be paid prior to and ahead of all claims.

Upon the filing of a complaint by the Attorney General for the orderly liquidation and dissolution of a community currency exchange, as herein provided, all pending suits and actions upon unsecured claims against such currency exchange shall abate; provided, however, that nothing contained herein shall prevent such claimants from filing their claims in the liquidation proceeding. In the event a suit or an action is instituted or maintained by the receiver on any bond or policy of insurance issued pursuant to the requirements of this Act, the bonding or insurance company sued, shall not have the right to interpose or maintain any counterclaim based upon subrogation, or upon any express or implied agreement of, or right to, indemnity or exonera-

DISSENTING OPINION

HEFFMAN, *District Judge*, dissenting.

I am aware of no decision in which the Supreme Court of the United States has held that a federal district court must, or even should, refuse to entertain a suit under the circumstances present here. The jurisdiction of this court is properly invoked. The plaintiffs, supported by the decision of another three judge court in *Currency Services, Inc. v. Matthews*, 90 F. Supp. 40 (W.D. Wis. 1950), have raised a substantial federal constitutional question. The application of the challenged statute to the plaintiffs is unquestioned, and the Supreme Court of Illinois has already upheld the exemption of American Express Company without suggesting that its decision in any way rested on the nature of the activities of the plaintiffs in the decided case, [*McDougall v. Lueder*, 389 Ill. 141 (1945)]. The balance between state-federal relations is not so delicate that it would be upset by this court's consideration of the merits of the plaintiffs' claim that the Illinois Currency Exchange Act has deprived them of the equal protection of the laws.

I would grant the prayer of the plaintiffs' amended complaint.

tion, or upon any other express or implied agreement with, or right against, the currency exchange. Nothing herein contained shall prevent such bonding or insurance company from filing such claim in the liquidation proceeding. As amended by act approved June 26, 1951: L.1951, p. 551.

45.2 *Closing up business — Procedure — Deposit — Notice.* § 15.2. No community currency exchange shall de-

termine its affairs and close up its business unless it shall first deposit with the Auditor an amount of money equal to the whole of its debts, liabilities and lawful demands against it, including the costs and expenses of this proceeding, and shall surrender to the Auditor its community currency exchange license, and shall file with the Auditor a statement of termination signed by the licensee of such community currency exchange, containing a pronouncement of intent to close up its business and liquidate its liabilities, and also containing a sworn list itemizing in full all such debts, liabilities and lawful demands against it. Corporate licensees shall attach to, and make a part of such statement of termination, a copy of a resolution providing for the determination and closing up of the licensee's affairs, certified by the secretary of such licensee and duly adopted at a shareholders' meeting by the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting. Upon the filing with the Auditor of a statement of termination the Auditor shall cause notice thereof to be published once each week for three consecutive weeks in a public newspaper of general circulation published in the city or village where such community currency exchange is located, and if no newspaper shall be there published, then in a public newspaper of general circulation nearest to said city or village; and such publication shall give notice that the debts, liabilities and lawful demands against such community currency exchange will be redeemed by the Auditor on demand in writing made by the owner thereof, at any time within three years from the date of first publication. After the expiration of such three year period, the Auditor shall return to the person or persons designated in the statement of termination to receive such repayment

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming on to be heard before a three judge court convened pursuant to 28 U.S.C. §§ 2281 and 2284, upon the amended complaint filed by plaintiffs and the answers filed by the defendants, and the court having heard evidence presented in open court and having considered all such evidence heretofore taken, as well as all exhibits offered and received in evidence, and the matter having been argued by counsel, and the court having heard the statements and arguments of counsel and being fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The court finds:

(1) This is an action in equity brought by plaintiffs pursuant to the provisions of Sections 2281 and 2284 of Title 28 U.S.C. seeking a permanent injunction to enjoin Orville Hodge, Auditor of Public Accounts of the State of Illinois, Latham Castle, Attorney General of the State of Illinois, and John Guiknecht, State's Attorney of Cook County, Illinois, from enforcing against the plaintiffs the provisions of the Illinois Community Currency Exchanges Act, Sections 30 to 56.3 of Chapter 16½ of the Illinois Revised Statutes, 1953, and also praying that said Act be declared unconstitutional and void in its application to plaintiffs on the ground that it denies the plaintiffs the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) The amount in controversy herein exceeds the sum of \$3,000, exclusive of interest and costs.

and in the report therein specified, any balance of money then remaining in his possession, if any there be, after first deducting therefrom all unpaid costs and expenses incurred in connection with this proceeding. The Auditor shall receive for his services, exclusive of costs and expenses, two per cent of any amount up to \$5,000.00, and one per cent of any amount in excess of \$5,000.00, deposited with him hereunder by any one community currency exchange. Nothing contained herein shall affect or impair the liability of any bonding or insurance company on any bond or insurance policy issued under this Act relating to such community currency exchange. Added by act approved June 26, 1951. L.1951, p. 551.

46. *Annual report — Investigations — Costs:*] . § 16.

Each licensee shall annually, on or before the fifteenth day of November, file a report with the Auditor for the fiscal year period from October 1st through September 30th (which shall be used only for the official purposes of the Auditor) giving such relevant information as the Auditor may reasonably require concerning, and for the purpose of examining, the business and operations during the preceding fiscal year period of each licensed currency exchange conducted by such licensee within the State. Such report shall be made under oath and shall be in the form prescribed by the Auditor and the Auditor may at any time and shall at least once in each year investigate the currency exchange business of any licensee and of every person, partnership, association and corporation who or which shall be engaged in the business of operating a currency exchange. For that purpose, the Auditor shall have free access to the offices and places of business and to such records of all such persons, firms, partnerships, associations and corporations and to the officers and directors thereof that shall relate to such currency exchange business. The Auditor may at any time, and shall at least once a year, inspect the locations served by an ambulatory currency exchange, for the purpose of determining whether such currency exchange is complying with the provisions of this Act at each location served. The Auditor may require by

subpoena the attendance of and examine under oath all persons whose testimony he may require relative to such business, and in such cases the Auditor, or any qualified representative of the Auditor whom the Auditor may designate, may administer oaths to all such persons called as witnesses, and the Auditor, or any such qualified representative of the Auditor, may conduct such examinations, and there shall be paid to the Auditor for each such examination a fee of \$20.00 for each day or part thereof for each qualified representative designated and required to conduct the examination; provided, however, that in the case of an ambulatory currency exchange, such fee shall not be increased by reason of the number of locations served by it. As amended by act approved June 27, 1951, L.1951, p. 562.

47. *Records.* § 17. Every licensee shall keep and use in his business such books, accounts and records as will enable the Auditor to determine whether such licensee is complying with the provisions of this Act and with the rules, regulations and directions made by the Auditor hereunder.

48. *Permanent address.* § 18. The applicant for a community currency exchange license shall have a permanent address as evidenced by a lease of at least six months duration or other suitable evidence of permanency, and the license issued, pursuant to the application shall be valid only at that address or any new address approved by the Auditor. As amended by act approved June 27, 1951, L.1951, p. 562.

49. *Rules and regulations — Record — Copies.* § 19. The Auditor may make and enforce such reasonable, relevant regulations, directions, orders, decisions and findings as may be necessary for the execution and enforcement of this Act and the purposes sought to be attained herein. All such regulations, directions, orders, decisions and findings shall be filed and entered by the Auditor in an indexed permanent book or record, with the effective date thereof suitably indicated, and such book or record shall be a public document. All regulations and

directions, which are of a general character, shall be printed and copies thereof mailed to all licensees within ten (10) days after filing as aforesaid. Copies of all findings, orders and decisions shall be mailed to the parties affected thereby by United States mail within five (5) days of such filing.

19.1 Armed guard. § 19.1 Whenever an ambulatory currency exchange shall be actively engaged at any place or station on a location licensed under this Act in the cashing of checks other than from within an armored vehicle, such currency exchange shall provide at least one armed guard at each such place or station in addition to the person or persons cashing checks. Added by act approved June 27, 1951. L.1951, p. 562.

19.2 Surety bond. § 19.2. Before any license or renewal of license shall be issued for any location served by an ambulatory currency exchange, the applicant thereof shall file with and have approved by the Auditor a surety bond for each such location, issued by a bonding or insurance company, licensed to do business in this State, in the penal sum of \$2,000.00. The bond shall be conditioned that the licensee serving the location shall comply with Section 19.1 of this Act and shall pay all lawful claims for money or other property loss, or bodily injury, suffered in the course and by reason of a holdup at such location, that shall occur at the time or times when said licensee failed to comply with said Section 19.1. Such bond shall run to the Auditor and shall inure to the benefit of any person or persons who shall establish a lawful claim or claims as aforesaid. The applicant shall have the right, at his, their, or its option, to file in lieu of the bond or bonds required by this section, a blanket surety bond, which he, they, or it shall have approved by the Auditor, issued by a bonding or insurance company, licensed to do business in this State, covering all the locations served and to be served by such applicant in a penal sum of not to exceed \$100,000.00, conditioned and payable as aforesaid, and specifying that the liability thereunder for each location shall be limited to \$2,000.00. Added by act approved June 27, 1951. L.1951, p. 562.

50. *False swearing.*] § 20. Every person having taken an oath in any proceeding or matter wherein an oath is required by this Act, who shall swear wilfully, corruptly or falsely in a matter material to the issue or point in question, or shall suborn any other person to swear as aforesaid, shall be guilty of perjury or subornation of perjury, as the case may be.

51. *Notice may be mailed.*] § 21. Except as otherwise provided for in this Act, whenever the Auditor is required to give notice to any applicant or licensee, such requirement shall be complied with if, within the time fixed herein, such notice shall be enclosed in an envelope plainly addressed to such applicant or licensee, as the case may be, at the address set forth in the application or license, as the case may be, United States postage fully prepaid, and deposited, registered, in the United States mail.

52. § 22. Repealed by act approved June 9, 1949. L.1949, p. 335.

52.1 *Review under Administrative Review Act.*] § 22.01. All final administrative decisions of the Auditor hereunder shall be subject to judicial review pursuant to the provisions of the "Administrative Review Act", approved May 8, 1951, and all amendments and modifications thereof, and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 1 of the "Administrative Review Act." Added by act approved June 9, 1949. L. 1949, p. 335.

52.2 *Appeal to Supreme Court.*] § 22.02. Appeals from all final orders and judgments entered by a court in review of any final administrative decision of the Auditor hereunder may be taken directly to the Supreme Court by either party to the action in accordance with the provisions of the "Civil Practice Act" relating to appeals, and all existing and future amendments and modifications thereof and the rules adopted pursuant thereto. Added by act approved June 9, 1949. L.1949, p. 335.

53. *Fraudulent taking or secreting money or property.]*

§ 23. If any licensee, or agent or employee of a licensee, fraudulently takes and secretes any money, note, bill, bond or other property belonging to another and in the possession and custody of such licensee as agent or otherwise, he shall be guilty of larceny and punished accordingly.

54. *Penalties.]* § 24. Any person, firm, association, partnership or corporation who or which shall violate any provision of this Act for which no other penalty is herein prescribed shall, upon conviction, be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00), and each violation shall constitute a separate offense.

55. *Approval of location.]* § 25. Any community currency exchange in existence upon the date of the passage of this Act shall be approved by the Auditor as to location, if all other requirements set forth in this Act shall have been complied with.

56. *Construction of act.]* § 27. Nothing contained in this Act shall be construed so as to limit the power of municipalities to license and tax community currency exchanges, and to regulate their location and operation in a manner not inconsistent with this Act.

56.1 *Application of certain provisions.]* § 28. Unless an ambulatory currency exchange shall engage in the business of selling or issuing money orders under his, their or its name, or any money orders other than those excepted in Section 1 of this Act, Section 5, 6 and 7 of this Act shall not be applicable to it. Otherwise, said sections shall apply to it, if it shall engage in such business. Added by act approved June 27, 1951: L.1951, p. 562.

56.2 *Unlicensed currency exchanges—Injunction.]* § 29. The operation of any unlicensed community or ambulatory currency exchange, or the unlawful conduct or operation of any licensed community or ambulatory currency exchange, is hereby declared to constitute unfair

competition with licensed and legally operated currency exchanges doing business in the same community. Any licensee operating legally under this Act in the same community shall have the right to apply to any court of competent jurisdiction for and obtain an injunction restraining such unfair competition. Added by act approved June 27, 1951, L. 1951, p. 562.

30.3 Partial invalidity. § 30. If any part or provision of this Act shall be declared unconstitutional, the unconstitutionality of such part or provision shall not invalidate the constitutional provisions of this Act. Added by act approved June 27, 1951, L. 1951, p. 562.

THE OPINIONS BELOW.

Opinion of the United States District Court, Northern District of Illinois, Eastern Division, Civil Action No. 53 C 2322, *George W. Doud, et al. v. Orrille Hodge, Auditor of Public Accounts, etc., et al.*

February 4th, 1955

Before Elmer J. Schmackenberg, *Judge* of the United States Court of Appeals for the Seventh Circuit, and Julius J. Hoffman and Walter J. LaBuy, *District Judges*.

Schmackenberg, *Circuit Judge*. Plaintiffs, George W. Doud, Donald Q. McDonald and J. Wesley Carlson, as a partnership; and plaintiff, Eugene Derrick, agent of said partnership, by their amended complaint seek an injunction restraining the defendants, who are the Auditor of Public Accounts and the Attorney General of the State of Illinois, and the State's Attorney of Cook County, Illinois, from enforcing against said plaintiffs the provisions of the Illinois Community Currency Exchange Act, upon the ground that said act is unconstitutional in that, according to plaintiffs, it denies them the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Defendants filed answers and evidence was adduced by the respective parties.

An *amicus curiae* makes the contention (which has been adopted by the defendants) that the court has no jurisdiction to decide the question of constitutionality

¹ Secs. 30 to 56.3 inclusive, Chap. 16½, Ill. Rev. Stat. 1953.

It does not operate under any franchise granted by the State of Illinois and is not subject to regulation by any regulatory body thereof.

It thus appears that plaintiffs intend to engage in only one phase of the activities in which a community currency exchange may engage if licensed under the Act in question; that is, the business of selling or issuing money orders under their name. It also appears that American Express Company, which is exempt from the operation of the Act, is engaging in the same activity. It further appears that plaintiffs intend to; and American Express Company does, engage in this business through agents operating retail stores of the same types.

Plaintiffs argue that "it is the function and duty of this court to determine whether or not the Act in question violates the Fourteenth Amendment as applied to these plaintiffs."

On the other hand the *amici curiae* and the defendants argue that it is not the function and duty of this court to determine that question unless and until plaintiffs secure an answer to that question from the Illinois Supreme Court.

It would seem that a plausible argument could be made, on behalf of plaintiffs, to the Illinois Supreme Court, predicated upon the fact that in view of the identical similarity of the business conducted by American Express Company, which is exempt from regulation under the Act, and that in which plaintiffs intend to engage and which on its face the Act says must be regulated by the State, is an arbitrary discrimination. If this argument were made to and accepted as valid by the Illinois Supreme Court, it might well grant to plaintiffs the very relief

which they are seeking in this court and hence a suit of this character would be unnecessary. A three judge court, in a case involving a similar situation arising under the currency exchange act of the State of Wisconsin, held that the exemption of American Express Company rendered the statute discriminatory and unconstitutional as applied to the plaintiff in that case, *Currency Services v. Matthews*, 90 F. Supp. 40, at 43, 45. However, there no question was raised as to the federal court's jurisdiction, such as the question which now confronts us.

Whether in plaintiffs' situation the Illinois Supreme Court would hold the exemption of American Express Company from the application of the Act constitutional or unconstitutional we do not know. Not having that prescience and being unwilling to guess as to how the Illinois court would decide this question when and if it were presented to it, we have no jurisdiction to make that decision ourselves. Hence we cannot decide the constitutional question presented in the absence of such authoritative determination by the Illinois Supreme Court.

Plaintiffs seem to argue that in *McDougall v. Lueder*, 389 Ill. 141, the Illinois Supreme Court has already, in effect, decided that the Illinois Act, as to plaintiffs, does not violate the equal protection of the law provision of the federal constitution, and, accordingly, this court should grant appropriate relief, and that no further state court decision is necessary. In so urging, plaintiffs overlook the plain distinction between the business of the plaintiffs in the *McDougall* case and the business in which they (plaintiffs herein) intend to engage. That distinction plaintiffs themselves have made and emphasized. The *McDougall* plaintiffs were engaged in the general broad activities of a currency exchange, as distinguished from the limited activities in which plaintiffs herein intend to

(3) The plaintiffs George W. Doud, Donald Q. McDonald and J. Wesley Carlson constitute a partnership which is organized for the purpose of, intends to engage, and has been engaging, not in the ordinary business of a currency exchange, but exclusively in the business of selling and issuing money orders under the firm name "Bondified Systems", in the Counties of DuPage and Cook and other portions of the State of Illinois. That business is to be conducted through agents who are principally persons engaged in operating retail drug, hardware and grocery stores.

(4) On August 11, 1953, said plaintiffs appointed the plaintiff Derrick (who conducts a drug store) as their agent for the sale to the public of post card checks and money orders issued by the partnership firm.

(5) American Express Company is an aggregation of individuals operating under a joint stock company plan. It is not a corporation. It sells and issues money orders in the City of Chicago, Illinois, through operators of drug and grocery stores. It does not operate under any franchise granted by the State of Illinois and is not subject to regulation by any regulatory body thereof.

(6) It thus appears that plaintiffs intend to engage in only one phase of the activities in which a currency exchange may engage if licensed under the Act in question; that is the business of selling or issuing money orders under their name. It also appears that American Express Company, which is exempt from the operation of the Act, is engaging in the same activity.

(7) It further appears that plaintiffs intend to, and American Express Company does, engage in this business through agents operating retail stores of the same types.

(8) American Express Company operates only that part of a general currency exchange business which is limited to the issuing and selling of money orders. It does it without a license issued under the Act within the same limits in which plaintiffs wish to operate without being licensed.

CONCLUSIONS OF LAW.

1. Plaintiffs' application for a permanent injunction should be denied and the amended complaint should be dismissed for want of jurisdiction at plaintiffs' costs.

2. This court cannot decide the constitutional question presented in the absence of an authoritative determination by the Illinois Supreme Court that the exemption of American Express Company is constitutional as applied to persons in the position of these plaintiffs.

Enter:

ELMER J. SCHNACKENBERG,

*Judge of the United States Court
Appeals.*

WALTER J. LA BUY,

*Judge of the United States
District Court.*

JULIUS J. HOFFMAN,

*Judge of the United States
District Court.*

Dated: February 9th, 1955.

ORDER OF DISMISSAL FOR WANT OF JURISDICTION

This action has been heard by this court, Elmer J. Schnackenberg, *Circuit Judge* Presiding, and Walter J. LaBuy and Julius J. Hoffman, *District Judges*, sitting. The Court has heard and considered the evidence and arguments of counsel and has read and considered the briefs. It is fully advised in the premises.

Thereupon It Is Ordered in accordance with the views expressed in this Court's opinion, Schnackenberg, *J.* and LaBuy, *J.* concurring and Hoffman, *J.* dissenting, that the plaintiffs' action be and it is dismissed for want of this Court's jurisdiction.

Enter:

ELMER J. SCHNACKENBERG,

Judge.

WALTER J. LABUY,

Judge.

Dated: February 9, 1955.